No. 3196

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JULIUS RHUBERG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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STATEMENT.

The indictment in this case is drawn in four counts, each charging a violation of the Espionage Act of June 15, 1917, and all based upon the making by the defendant of the following utterances:

1. That the moneyed men had caused the United States to enter the war against Germany.
2. That Germany was in the right and the United States was in the wrong, and that he, the said defendant, hoped Germany would win and that Germany was sure to win.
3. That the best thing they, meaning the said men of registration age and subject to draft could do when in battle, would be to put up their hands and let the Germans take them prisoners.
4. That one German could lick ten Americans.
5. That the United States was so slow that Germany would have it whipped before it, the United States, got ready for war.

6. That the United States had no business in the war and ought not to have gone into it.

The jury returned a verdict of guilty as to Count 4 of this indictment and not guilty as to Counts 1 and 2 of the indictment. Count 3 was dismissed, upon motion of the Government, before trial.

The issue is, therefore, narrowed down to a construction of Count 4 of the indictment, and to a determination as to whether there is any error in the record upon which the jury based its verdict of guilty.

Count 4 of the indictment charges the defendant with having wilfully made the statements above set out, to and in the presence of William Mitchell, Luther Davis and others to the Grand Jury unknown, with the intention of obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, at a time when the United States was at war with the Imperial German Government. It is charged in the indictment that this language was uttered between the first day of June, 1917, and the first day of January, 1918, the exact dates being unknown to the Grand Jury.

This Count in the indictment is based upon the

third clause of Section 3, Title 1 of the Espionage Act, which reads as follows:

> "Whoever, when the United States is at war * * * shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine, etc."

ASSIGNMENTS OF ERROR 1, 2, 3 and 4.

These assignments of error are all predicated upon the fact that the Court denied the defendant's request at the close of all the evidence, to direct the Jury to return a verdict in his favor, thereby presenting but one question, and that is, whether or not there was any substantial evidence at the trial of his guilt. Under these assignments, it is also contended that there was a fatal variance between the charge made in the Fourth Count and the evidence and proof submitted. This point will also be discussed under assignment of error 6.

LUTHER DAVIS, called by the Government as a witness to sustain the charge alleged in Count Four, testified that he was 22 years of age; was married and lived and farmed at Kent, Oregon; that he had duly registered on June 5, 1917; had been classified, but had not yet been called into the service: that he had known the defendant for

about three years; that he had discussed the war with defendant prior to our entrance therein and in particular in the spring of 1917, at which time the defendant, among other statements, took occasion to say:

That the United States was sending ammunition with which to kill the Germans.

That the United States had never been neutral and had no business in sending ammunition to England.

That Germany was perfectly right in sinking the Lusitania and that ships carrying contraband of war with passengers on them, who had no more sense than to ride in time of war, ought to be sunk.

That if this country got into the war the Germans in this country would rebel against this Government.

That this country was in no shape to fight the German Government.

That the training of the German Army was far superior to the American Army.

That Germany was a fine country and one enjoyed greater freedom in that country than in the United States.

(Trans. p. 52-53.)

Questioned particularly as to what statements were made by the defendant after our declaration of war with Germany, the witness testified that in August, 1917, the defendant told him of a Mr. Von Borstel, a naturalized citizen of German birth and descent, having seen some troops in The Dalles, Oregon, and that they handled a gun like a kid. The witness further testified that defendant said that Germany was in the right and that it was bound to win; that the Germans always took the right side of everything; that they had never lost a war and never would. It does not appear in the bill of exceptions as to the particular date when this last conversation took place. (Trans. p. 53-54.)

However, it is made clear in the transcript that the following conversation did take place some time in November, 1917, and subsequent to our entrance into the war. This occurred during a visit made by the witness to the home of the defendant at the Mackin ranch, on which occasion the witness testified to having seen on the wall therein the Kaiser's picture and the German flag. It was at that time, according to the testimony of the witness, that the defendant made the following statements:

1. That this country had no business and no cause whatever to be in the war.

2. That the moneyed men and the men of the shipping interests and men around those big steel factories in the East, making ammunition, were the men that had brought us in the war.

3. That defendant would not advise any man that did not have a surplus amount of money, to invest in Liberty Bonds. That in a couple of years they would go down; that probably they would not be worth 25 per cent under par.

4. That defendant advised witness not to enlist.

5. That witness should not go into the army until he was drafted, for if a bullet did not kill him, he would die of sickness on account of so many dead people.

6. That Germany had a fine army.
(Trans. P. 54.)

It further appeared from the testimony of this witness that the effect of these conversations prior to the war upon him, was to cause him to begin to think that Germany was in the right; that the

United States was not neutral in sending ammunition to the Allies and that the sinking of the Lusitania was justifiable; that, however, the conversations had with him subsequent to our entrance into the war did not have much effect as he had been talking to other people and that it put him to thinking.

Questioned by the Court, the witness testified that the defendant appeared to be very much in earnest at the time of his last conversation about the war and appeared to try to impress upon the witness what he said. (Trans. P. 55.)

WILLIAM MITCHELL, the other person mentioned in this count of the indictment, testified that he was 34 years of age; that his business was farming and that he lived at Kent, Oregon; that he had known the defendant for two years; that some time in June, 1917, somewhere between the 5th and the 20th, he could not say exactly for sure, the defendant had a talk with him about the war, at which time the defendant made the following utterances:

1. That this country had no business in the war against Germany.

2. That the rich men caused this war, and it was, therefore, a rich man's war and

not that of the working people.

3. That we were wrong in entering the war as it was not our fight.

4. That this country would be helpless anyway—that before we could do any good the Western front would be taken, and the French and English whipped.

5. That it would take ten Americans to stand off one German.

(Trans. P. 63.)

It is, therefore, quite evident from the resume of the above testimony that the record does contain substantial evidence of the charge in this count of the indictment and warranted the Court in refusing the defendant's motion for a directed verdict.

With respect to defendant's contention that the testimony of William Mitchell was confined to a conversation had with defendant prior to the passage of the Espionage Act, it will be noted that the witness fixes the time as between June 5th and June 20th, 1917. The Espionage Act was approved June 15, 1917, thereby submittting an issue of fact for the jury to determine as to whether the conversation was had prior or subsequent to the passage

of this Act.

At any rate, it must be conceded that the testimony of Luther Davis, even if standing alone, would be sufficient to substantiate the charge made and to warrant its submission to the jury, so far as this assignment of error is concerned.

It is further argued that there is a variance in the charge of the indictment and the proof, as to the utterances having been made to and in the presence of Luther Davis and William Mitchell. While it may be true that the record discloses that the defendant made these statements, not in the presence of both Davis and Mitchell, but to each of them, on separate occasions, the variance in the proof, if it can be considered such, is not fatal, but immaterial, as proof was offered to show that these statements were in fact made to and in the presence of one of the persons mentioned in this count of the indictment.

The essential inquiry is, did the defendant wilfully use the language imputed to him, or some substantial part thereof, in the presence of both or either of them, or of other persons to the Grand Jury unknown, if any. (See Court's Instructions, Trans. P. 155.)

As bearing upon the motive and intent of the

defendant, it was competent for the Government to prove and for the jury to consider in determining the guilt or innocence of the defendant of the charge in Count 4 of the indictment, the following testimony offered by the Government:

CORLISS P. ANDREWS testified that he was 25 years of age and married to a girl of German parentage; that he had registered for military service and was subject to draft; that during the winter of 1914 and 1915 the defendant told witness:

> "That this country had no business shipping ammunition over there."
>
> "That we were not neutral so long as we did that."
>
> "That England was trying to shut Germany out of commerce on the seas, and trying to keep them down."
>
> "That the German people had more rights than the American people did, and that they were governed better."
>
> "That Germany was justified in using submarines because we had no business shipping ammunition over there and that was the only way they could stop it."

(Trans. P. 36.)

The witness further testified that after our entrance into the war, and particularly during the fall of 1917, probably in November, after he had registered and was awaiting a call into the service, the defendant, knowing that the witness had registered, told him the following:

1. That if he, the witness, was taken over to France and was in battle and got in a tight place, to throw up his hands and let the Germans take him prisoner.
2. That this country was so slow, that Germany would have us whipped before we got ready.
3. That Germany was in the right and the United States in the wrong, and that he, the defendant, hoped Germany would win and that it was sure to win.
4. That the moneyed men had caused the United States to go to war and that we had entered the war in order to get out money that we had loaned out.
5. That one German could lick ten Americans.
6. That the stuff that was in the papers

about Belgium atrocities was all lies; that they were just trying to stir up the people.

7. That if the United States kept in the war for two or three years, the Liberty Bonds would not be worth more than 25c or 50c on the dollar.

(Trans. P. 37.)

Questioned as to what effect the statements of Rhuberg made upon him prior to our entrance in the war, the witness testified that the defendant made him believe that Germany was in the right and was justified in doing some of the things that were being done; that the United States was not neutral and was aiding England against Germany. He further believed that the statements were made by Rhuberg to him for the purpose of discouraging him from going to war. (Page 39.)

MRS. LUTHER DAVIS, the wife of Luther Davis, testified that she was born in the United States, of German parents; that some time in the summer and fall of 1917, she being present, she heard the defendant tell her husband, Luther Davis, as follows:

1. That he should not enlist, because if he did enlist and did not get killed by Ger-

man bullets, he would die of some disease.

2. That anybody that would ride on the Lusitania, while the war was going on and it was carrying ammunition, ought to get killed.

3. That it was the rich people that were causing this war.

4. That the defendant was going back to Germany just as quick as the war was over.

5. That the defendant did not like America and was going back to Germany to live. (Trans. P. 58.)

The witness further testified that the defendant appeared to be embittered against this country. (Page 58.)

RAY SPROUL testified that he was 34 years of age and lived at Kent, Oregon, where he was engaged in farming; that some time in October or November, 1917, he had a conversation with the defendant, at which time he commented that they were certainly blowing up things in Europe, concerning which the witness testified as follows:

"Mr. Rhuberg, he says, 'That is just what

the Germans want.' 'Why,' I says, 'I should think it would make food short over there.' 'Well,' he says, 'It is all on French and English ground.' And I says, 'Well, that will probably change when the American soldiers get over there.' And he says, 'No, No,' he say, 'they will never step foot on German soil. One German is equal to a dozen Americans.' "

(Trans. P. 60.)

REVEREND TRUEBLOOD SMITH testified that he was the pastor of the First Presbyterian Church at Moro, Oregon; that on June 20, 1917, he met the defendant at the latter's ranch, while on his way to attend a Red Cross meeting held in Kent, concerning which the witness testified as follows:

"Q. What did he say with respect to the funds for the Red Cross, as to the necessity of the Government?"

"A. Well, one of the first questions was when he said 'What are you folks out here for? Do you wish funds for the American Red Cross?' He says 'You have no wounded soldiers.' He says, 'I support the German Red Cross Society, for we have many

wounded soldiers, and need for funds.' "

* * * *

"Q. And he said 'We have wounded'?"

"A. He says 'We have many wounded soldiers, and need for funds.' He said, 'I support the German Red Cross Society.' "

(Trans. P. 68-69.)

The witness further testified that the defendant at the time of this conversation also told him the following:

1. That we had no reason whatever for going to war with Germany.
2. That the Germans sunk the Lusitania and other vessels because they were lending aid to the enemies of Germany.
3. That the trouble with the United States is that this government will not permit its people or the papers to publish the truth concerning Germany. If so, the American people would not fight Germany, if they but knew the truth concerning Germany.

(Trans. P. 68.)

The salient features brought out in the exam-

ination of Julius Ruhberg, the defendant, indicate that he was born in 1861 in Schleswig-Holstein, then a Danish province, but ever since August 23, 1866, under German rule; that he had resided thereat until 1873, when he moved to Hamburg, Germany, where he attended school; that he served three years in the German Army; that in 1884 he came to the United States, where he took up ranching in Nevada and Oregon; that he forswore allegiance to Germany and became naturalized as an American citizen on June 27, 1889; that in 1900 he returned to Germany, where he married and came back to the United States with his wife that same year; that in 1904 he again returned to Germany with his wife, where they continued to live and remained continuously until 1913, just before the outbreak of the world war, when he left his wife in Germany, coming back alone to the United States and taking up a ranch belonging to one Von Borstel, near Kent, Oregon; that he brought with him at that time the picture of the Kaiser of Germany, which later adorned his place of residence and which he permitted to remain until even after our participation in the war; that he is worth about $20,000, $19,000 of which is in Germany; that he contributed nothing to the Red Cross or to any issues of the Government's Liberty Loans,

except one subscription for $100, which was made just prior to the trial. (Trans. P. 115.)

The following testimony was elicited from him by the Court:

> "Q. At the time this Government went to war with Germany on April 6, 1917, did you or did you not regret that this Government should take a hand in the war?"
>
> "A. Yes, your Honor. You see, certainly, I am born in Schleswig-Holstein, I hated to see that it had to come to it."
>
> "Q. You regretted that this Government should go to war with Germany, your own country?"
>
> "A. You see, while it may be no way out of it——"
>
> "Q. Answer the question."
>
> "A. And we have to do our duty, as we do our duty to this country, even if it was hard."
>
> "Q. Well, then, you regretted that this country should go to war with Germany?"
>
> "A. Yes sir."
>
> (Trans. P. 125-126.)

One of the defendant's own character witnesses, L. BARNUM, testified that while he knew the defendant as between 1900 to 1903, he knew nothing about the defendant subsequent to that time and further testified that as County Chairman of the State Council of Defense, he had received during the latter part of 1917 and 1918, some twenty-five complaints attacking the loyalty of the defendant. (Trans. P. 141.)

Summarizing the entire testimony before the jury, it could not seriously be argued that there was not any substantial testimony to support the verdict of guilty.

ASSIGNMENT OF ERROR 5.

This error is predicated upon the refusal of the Court to give the following requested instruction:

> "Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Rhuberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provis-

ion which makes its unlawful for any person while the United States is at war with any foreign power, to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a wilful obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Rhuberg did in fact result in any injury whatsoever, either to the recruit-

ing or enlistment service of the United States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

The Court had previously instructed the jury upon the law of the case as follows:

"We next turn to the declaration of the act, 'Whoever when the United States is at war shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States.' To obstruct in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part, and, as used in the indictment, it means active antagonism to the enforcement of the Act of Congress, that is, the act providing for the recruiting and enlistment service of the United States. The word does not mean as here used to wholly impede, or to block the way. It is sufficient that the act tends to hinder or to make it harder or more difficult for the Government to progress with the work of recruiting or enlistment of men into the service. Whatever has this effect works to the injury and

damage of the Government. The injury follows as the necessary and logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting and enlistment. No other or more specific injury to the United States than this is necessary or required to be shown.

"Having defined these offenses, so denounced by statute, you will appreciate how essential it is for the successful prosecution of the war that none of these evils shall possess the men of the country subject to the selective draft, and that no obstruction shall be interposed in any way to impede, retard, hinder, or make it harder or more difficult for the Government to recruit and enlist men in the military service; hence there is great and wholesome reason for the statute, and the reason for its rigid enforcement is just as potent and overpowering. Nothing should interfere with the military and naval forces of the United States, nor with the work of recruiting or enlistment of the men that go to make up such forces. Any means employed by which to cause the

evils enumerated, or any one of them, is denounced. You will note that the term wilfully is employed in the statement of the statute as to what will constitute the offense. This means that the acts complained of must have been done with knowledge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby, and had such purpose therein, that the result of doing such acts would be to cause insubordination, disloyalty, or refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service, to the injury of the United States."

(Trans. P. 153-154.)

It is urged by defendant that in order to constitute this offense there must be evidence that the statements made by Rhuberg did in fact actually result in injury to the recruiting or enlistment service of the United States.

That this law requires no such extreme proof in order to constitute the offense, and that the Court correctly stated all the essential elements of the law, is evident from the following interpreta-

tions of this particular clause in the Espionage Act, as reported in the Bulletins issued by the Department of Justice, called "Interpretations of War Statutes." These mainly contain the charges to juries by judges of the various district courts of the United States. Wherever these cases have gone to the appellate court or have been reported, the citations will be given.

Bulletin 4 contains the charge of District Judge Wade to the jury (U. S. D. C. Iowa) in the case of the United States vs. Daniel H. Wallace. Among the statements attributed to the defendant in this case were:

> "That this was a capitalist war. That soldiers were giving their lives for the capitalists. That 40 per cent of the ammunition of the Allies or their guns was defective because of graft."

The Court, in his charge, said:

> "It isn't, of course, now a question of whether he said all of these things just as the Government said he did, but it is a question of whether he said any of them, the natural consequence of which would be that it would obstruct the recruiting and enlisting service of the United States. The Govern-

> ment doesn't have to go out and find a particular individual that was restrained from entering the service of the United States because of this speech; it is sufficient if it has proven that he uttered words there, the natural and probable consequence of which upon the public mind would obstruct recruiting or enlistment, with an intention that it should do so."

Bulletin No. 7 (U. S. Circuit Court of Appeals for the Second Circuit) is the case of Masses Publishing Company vs. Patten, Postmaster, New York City, which is reported in 246 Fed. 38. This came up on appeal from an order of the United States District Court for the Southern District of New York, granting a temporary injunction commanding the defendant to permit a magazine known as the "Masses" through the mails (244 Fed. 535 and 245 Fed. 102). The postmaster had held that this magazine was non-mailable by virtue of the provision of Title 12 of the Espionage Act, which closes the United States mails to any literature in furtherance of the acts denounced by Section 3 of the Espionage Act. With respect to that provision applicable to the case at issue, the appellate court said:

> "That one may wilfully obstruct the en-

listment service without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest seems to us too plain for controversy. To obstruct the recruiting or enlistment service within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal, Judge Hough declared that 'It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction 'Go thou and do likewise.' With this statement we fully agree. Moreover it is not necessary that an incitement to crime must be direct. At common law the 'counseling' which constituted one an accessory before the fact might be indirect." (See Wharton's Crim-

inal Law, 11th Ed., Sec. 266.)

Bulletin No. 15 contains the opinion of District Judge Ray (U. S. D. C. Northern District of New York) upon the demurrer to the indictment in the case of the United States vs. Pierce for distributing a pamphlet entitled "The Price We Pay." This opinion is reported in 245 Fed. 878.

The Court in considering the clause of Section 3 in issue said:

> "But the obstruction need not be physical and all obstruction of such service is injurious to the service of the United States. Obstruction does not necessarily imply prevention. The flowing stream of water may be obstructed, and often is, while its continuous onward flow is not wholly prevented and its ultimate onward flow may not be prevented at all. Any and all acts and words or writings that interfere with the operation or success of the military or naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings, to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war, work to the injury of the service of

the United States. When Congress wrote into section 3, above quoted, the words 'or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States' it may have had in mind the hundreds and thousands of cases where fathers and mothers and brothers and sisters will obstruct in a way and to an extent the recruiting and enlistment service by urging and soliciting their sons and brothers not to enlist. No one will contend, I think, that such an act will be held a wilful obstruction of the enlistment service to the injury of the service of the United States within the intent and meaning of section 3 of the act under consideration. But should some person go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers and consequences of war, impugning the motives and purpose of the President and Congress in declaring war, and misrepresenting the objects sought to be attained by our Government in declaring the existence of a state of war, we have a case where a jury may well find a wilful obstruction of the recruiting or enlist-

ment service of the United States to the injury of the service of the United States even if the Government is unable to prove that a single person was induced by such acts not to enlist when otherwise he should have enlisted.

Bulletin 49 contains the charge of District Judge Wade (U. S. D. C. North Dakota) in the case of the United States vs. Kate Richard O'Hare. The Court said:

"And you must further find that the natural and ordinary result of the language used by her in the manner in which she used it, in the connection in which she used it, would be to interfere with the enlistment or recruiting service of the United States. Here, of course, you have to take into consideration what are matters of common knowledge, that men must go from home, and fathers and mothers must make the sacrifice, that men who enlist are often influenced more or less by the wishes of their parents, and they are influenced more or less by their view of the conditions that they are entering; take all those things into consideration: then take the language used, if you find it was used, as heretofore instruct-

ed, and determine whether or not her purpose and intent was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, whether or not it would interfere naturally with the number of enlistments, or the number recruited by the recruiting officers. It is not necessary, of course, and not practicable, that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said were said with that purpose, and that they were in their nature such as ordinarily would bring about that result. Then the offense is complete."

Bulletin No. 53 contains the charge of District Judge Lewis (U. S. D. C. Colorado) in the case of the United States vs. Orlando Hitt. The Court said:

"There are many ways that would occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the

point of actually stopping the whole service. It might be obstructed by taking the registration list and destroying it; by obliterating some names on that list, and by persuading some young men who are on that list and subject to call, to flee the country or to resist being put into the service. It might extend only to one man, but that would be obstruction. So that obstruction in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service or of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way, and to such an extent, as to render more burdensome or difficult the enforcement and the execution of the law, to the injury of the service or of the United States."

To like effect is this same judge's instruction in the case of the United States vs. Pearley Doe, reported in Bulletin No. 55 (U. S. C. D. Colorado). This was a case where the defendant was charged

with mailing circular letters which were alleged to be non-mailable, because it was sought thereby to wilfully obstruct the recruiting and enlistment service.

Bulletin No. 56 contains the instructions of District Judge Lewis (U. S. D. C. Colorado) in the case of the United States vs. W. B. Tanner. In this case the defendant was in the second count indicted for making the following statements with the intent to wilfully obstruct the recruiting and enlistment service:

> "There is no security behind the Liberty Bonds."
>
> "The conservation of food is all bosh."
>
> "As soon as the capitalists on Wall Street have all the money they want, this war will be over in 24 hours."

And in the fourth count for a similar violation by the use of the following language:

> "The Liberty Bonds will only be worth 50c on the dollar within two years."
>
> "The first thing we ought to do right after Congress meets is to impeach that Wilson."

"Talk about being under the Kaiser. Well, it is a whole lot worse over here in this country."

"England and France will be forced to quit."

"The United States will have to come down off her high horse."

The Judge in his instructions upon these two counts said:

"The word 'obstruct,' used in the statute in the definition of the second offense therein set forth, is perhaps of broader significance. This word can be used to apply to different degrees of the same thought or idea. To obstruct means, in its broad sense, to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment it means active antagonism to the enforcement of the act of Congress; that is, to effectually resist or oppose the command of the law, to the injury of the service of the United States, or by acts or words to intentionally cause others to do so. It means to interfere or intermeddle in such a way to such an extent as to render more burdensome or difficult

the enforcement and execution of the law, to the injury of the service or of the United States.

"Your attention has been called in the argument to the constitutional guaranty of free speech, but you are instructed that this guaranty cannot be successfully invoked as a protection where the honor and safety of the Nation is involved. And this statute, which the indictment charges the defendant violated, is a constitutional and proper enactment to safeguard the national honor and safety."

Bulletin No. 76 contains the instructions of District Judge Jack (U. S. D. C. Louisiana) in the case of the United States vs. S. J. Harper. In this indictment the defendant was charged with wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service by the use of the following language:

"This is a poor man's fight and a rich man's war."

"President Wilson and Congress ought to be assassinated."

"My boy and I will take to the woods and

die there before we would go to war."

The Court upon this point charged:

"Two witnesses for the Government, Cupp and Ray, testified that this statement was made in their presence. The defendant, on the stand, denies that he made any such statement. It is for you to determine whose testimony you will believe and whose you will reject in reaching your conclusion as to whether the statement in substantially this form was made. If you find that such a statement was made, then you will have to determine whether or not it obstructed the enlistment and recruiting service. At the time this statement is alleged to have been made the United States was, and is engaged in recruiting and in the enlistment of men under the draft act for service in the Army. If you find that such language was used by defendant in talking to Cupp and Ray, then you should consider whether the natural result of such statements to these parties at the time and under the circumstances would be to interfere with the enlistment and recruiting service of the United States to the injury of the United States, and whether

defendant intended that it should so interfere. If you so find, then you would be justified in concluding that in fact it did so obstruct such recruiting and enlistment service as charged to the injury of the service of the United States."

Bulletin No. 78 contains the instructions of District Judge Cushman (U. S. D. C. Western District of Washington) in the case of the United States vs. Leonard Foster. The Court said:

"Counts 3 and 6 accuse the defendants, and each one of them, of unlawfully, wilfully, knowingly and feloniously obstructing the recruiting and enlistment of the United States to the injury of the service of the United States. Under these counts the question for you to determine is whether the defendants, or any one of them, wilfully and knowingly obstructed the recruiting and enlistment service of the United States, but the obstruction need not be physical, and all obstruction of such service is injurious to the service of the United States. Obstruction does not necessarily imply prevention. Any and all acts and words or writings that interfere with the operation or success of the

military and naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war work to the injury of the service of the United States. If some third person should go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers or consequences of war, impugning the motives and purposes of the President or Congress in declaring war, and misrepresenting the objects sought to be attained by our Government in declaring the existence of a state of war, we would have a case where a jury well may find a wilful obstruction of the recruiting or enlistment service of the United States to the injury of the service of the United States, even if the Government is unable to prove that a single person was induced by such acts not to enlist when otherwise he would have enlisted."

Bulletin No. 79 contains the instructions of District Judge Howe (U. S. D. C. Vermont) in the

case of the United States vs. Clarence H. Waldron. The Court said:

"This count charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, and in considering the case under this count the word 'wilful,' as used here, means the same as it was defined to mean under the second count. The word 'obstruct' is defined to mean 'to hinder,' 'to embarrass,' 'to make progress in the recruiting or enlistment service more difficult or slow,' and in its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; 'to the injury of the United States' is defined to mean to hinder or delay enlistments in the military or naval service of the United States. Active opposition to the recruiting or enlistment service of the United States would tend to injure such service.

"To repeat, the statute provides that it shall be unlawful for a person when the United States is at war to wilfully obstruct the recruiting or enlistment service of the

United States to the injury of the service of the United States, and the word 'obstruct' is defined to mean 'to hinder,' 'to embarrass,' 'to make progress more difficult or slow,' and in its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; 'to the injury of the United States' is defined to mean to hinder or delay enlistments in the military or naval service of the United States. Active opposition to the recruiting or enlistment service of the United States would tend to injure such service.

"To say to young men between the ages of 21 and 30, inclusive, after they had registered for military duty on June 5, 1917, in obedience to the proclamation of the President, 'The boys will have to register, but if called upon it does not mean they will have to go'; 'when the draft call comes, do not heed it, the law will pick it up and fool around with you for a year, and by that time the war will be over'; 'personally I would resist the draft to being shot'; 'a Christian ought not and should not fight'; 'a Christian can take no part in the war';

'you will have to register, but you will not have to fight'; 'do not shed your precious blood for your country'; and what is said in the pamphlet, would tend to obstruct the recruiting and enlistment service of the United States and injure the service of the United States."

Bulletin No. 81 contains the charge of District Judge Elliott (U. S. D. C. South Dakota) in the case of the United States vs. John H. Wolf. The Court said:

"Now, in that connection, you are instructed that there are many ways that could occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the point of actually stopping the whole service. It might be obstructed by taking the registration list and destroying it; by obliterating some of the names on the list; and by persuading some young men who are on that list and subject to call to flee the country or to resist being put in the service. It might extend only to one man, but that would be obstruction. So that obstruction

in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment, it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement and execution of the law, to the injury of the service of the United States. You are instructed that even though you find the words alleged in the indictment to have been spoken, you must still, before you can convict, determine the question as to whether or not they were used wilfully. This is the same subject that I have attempted to cover, except it is stated in a different way; that is, that they were intentionally made and that they were made with the purpose and that that purpose was the thing that is prohibited and referred to in the separate counts in the indictment; that is, prohibited by the different provisions of this

section 3, under which the indictment is drawn. You must further find that the natural and ordinary result of the language used by him, in the manner in which you find that he used it, under the circumstances in which you find he used it, would be to obstruct the recruiting and enlistment service of the United States.

"Here, of course, you have to take into consideration what are matters of common knowledge, that men must go from home, and fathers and mothers must make the sacrifice, that men who enlist are often influenced more or less by the wishes of their parents, and they are influenced more or less by their view of conditions that they are entering; take all those things into consideration; then take the language used, if you find it was used, as heretofore instructed, and determine whether or not his purpose and intent were to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, whether or not it would

interfere naturally with the number of enlistments, or the number recruited by the recruiting officers. It is not necessary, of course, and not practical that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said, as you find under the circumstances they were said, as you find them, were said with that purpose and that they had the necessary tendency to do the things that are prohibited by this section and that they were in their nature such as ordinarily would bring about or tend to bring about that result. Then the offense is complete."

Bulletin No. 82 contains the charge of District Judge Munger (U. S. D. C. Nebraska) in the case of the United States vs. Gustav Pundt. Here, the alleged statements were made to a young man not 18 years of age and, therefore, at that time not capable of enlisting. The Court said:

"To obstruct enlistment may be accomplished by the use of mere words. While we can understand that it could be done by acts such as by physical interference with those

who are endeavoring to enlist, it can equally well be done by statements and language the effect of which would be to impede, retard, discourage, and restrain those who otherwise might enlist. To obstruct may be accomplished by raising an obstacle, mental obstacle, in the mind of the person to whom the remarks are addressed, such as to cause him to pause and to hesitate, even though he might finally overcome and not be prevented from enlisting in the service of the United States. But if the remarks are such that they are reasonably and naturally calculated to cause the person to whom they are addressed to be impeded and retarded in his willingness to offer himself as an enlisted soldier and the effect of the remarks is to cause such a person to pause and be delayed in reaching a decision, then you can find that what was said was an obstruction to the enlistment service of the United States."

Bulletin No. 83 contains the charge of District Judge Howe (U. S. D. C. Vermont) in the case of the United States vs. Harold Mackley. The Court said:

"As to the offense charged in the fourth count: This count charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service of the United States, and in considering the case under this count the word 'wilfully' is defined to mean the same as it was defined to mean under the third count. The word 'obstruct' is the important word under this count, and that is defined to mean 'to hinder,' 'to embarrass,' 'to make progress in the recruiting or enlistment service more difficult or slow.' In its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; by describing the horrors of a soldier's life and the illtreatment of soldiers; by holding out to boys of military age that if he—the defendant—should happen to be called he would shoot his comrades, and by telling them that if all Germans would do the same Germany would win the war; and, in short, anything which would tend to deter others from enlisting, would constitute obstructing the enlistment service of the United States."

Bulletin No. 84 contains the opinion of Circuit Judge Buffington, upon appeal before the United States Circuit Court for the Third Circuit in the case of the United States vs. Krafft indicted for violation of the Espionage Act. A somewhat similar requested instruction was urged upon this appeal as in the one at issue, concerning which the Court said:

> "As further ground to support such request for binding instructions of acquittal the defendant contended 'that the evidence can not be complete until it is shown that these things are to the injury of the service of the United States; * * * * and that there is no evidence showing that such injury has occurred to the service of the United States. Assuming that the words were said, there is no evidence that the words had any more effect than to cause a disturbance in the crowd.
>
> "This request the court denied, saying: 'As I view it, there are really two questions, both of which are jury questions. The first question is whether or not the defendant spoke the words which are alleged in the indictment and which he is charged with

speaking. If he did not, that ends the case. The jury will determine whether he did that or not. Second, if he did, what was the intent in his own mind in speaking them? What effect did he intend that they should have upon those who listened who were already in the service or might possibly be called into the service; and it seems to me that, under the circumstances, that should be determined by the jury. Therefore, your motion will be denied and an exception granted.'

"This holding—viz, that there were two questions of fact involved; first, were the words charged spoken; and, secondly, if spoken, what was Krafft's intention in speaking them: what effect did Krafft intend they should have on those hearing them—were afterwards embodied in the charge which is printed in full on the margin.

"In thus confining the jury to the two issues specified above the court, in effect, denied the contention of defendant's counsel that to constitute the crime the Government was required to go further and show not

only that the words were used with the intent to effect insubordination, disloyalty, mutiny, or refusal of duty, but that they actually did produce that effect and injured the United States' service. Did the court commit an error in so holding? Was it necessary for the Government not only to show the defendant used the words; not only that he used them with intent to cause insubordination, but that it must be shown that his counsel and purpose actually caused mutiny, insubordination, disloyalty, or refusal to obey orders? We can not accept this view. Indeed, the clear statement of the defendant's proposition is its best refutation, for if that position be sound the defendant's guilt would be determined not by what he did in the way of counseling disloyalty, but in what his hearers did in the way of following his directions. In other words, the defendant could do all in his power to bring about disloyalty, but as long as he did not succeed he committed no crime; but if his counsel induced action, and that action resulted in insubordination or mutiny, then what the defendant did by way of counsel was later made a crime by

the person who followed his counsel.

"Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the act be given such meaning. In that regard the statute does not specify the writings, speech, or, indeed, the kind of means to be used; it makes one comprehensive, inclusive crime, 'whoever, when the United States is at war, shall cause'; that means actually cause, succeed in causing; that is one crime the statute specified; and, also, whoever shall wilfully 'attempt to cause' is put on the same status. Both 'wilfully causing' and 'wilfully attempting to cause' are by the statute made alike criminal. And such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on the theory that insubordination, mutiny, or disloyalty must be effected. To so hold would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination (in this case sown in August in Newark) at a later date in some camp sprang into life and brought forth fruit, but it was to prevent

the seed from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include anyone (for 'whosoever' is a broad word, inclusive word) who in any way wilfully created or attempted to cause insubordination. Clearly the court below was right in holding that if, in fact, the defendant used the language alleged, and if his purpose was wilful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that wilful purpose to succeed."

Bulletin No. 85 contains the remarks of District Judge Munger (U. S. D. C. Nebraska) in the case of the United States vs. Henry Frericks, upon a motion for a directed verdict:

"Now, to obstruct the recruiting or en-

listment service I take it to be not only to prevent recruiting or enlistment but to hinder or impede or put obstacles in the way of the service, and if the defendant by his language would chill the ardor or arouse the fears, or make reluctant or delay those to whom he was speaking, or whom otherwise might enlist I think it could be said that he was obstructing the recruiting service. We will suppose there was a meeting in a public hall where thousands were gathered together, and they were asking for soldiers to enlist in the war, and in the Army, and some were to arise and say that of those that enlisted half would be killed and wounded and rendered helpless for life. Now, that, without any proof that anyone actually was deterred, I think it may be stated that one who made that speech did obstruct the enlistment. That is, he raised a mental obstacle toward decision and resolution of those who would naturally enlist under the call of patriotism, and that he obstructed by the natural result of what he said the ardor or spirit that causes enlistment, and so I think that the jury may say under that count whether the defendant violated this act.

"The sixth count charges a statement somewhat similar made to Mr. Fisher, and perhaps Mr. Martin also. At any rate he said, 'Let the soldiers go to France,' swearing, 'We will sink them all, and make the ocean red with their blood. Germany cannot be whipped and the United States has no business in this war.' And other statements. I think it is proper for the jury to say whether that was wilful obstruction of the enlistment service. The last count says that he said, in order to obstruct the enlistment service, that 'even if only the women were left in Germany, Germany could defeat and overcome the United States in the war.' And these statements were all made to men within the enlistment age, so that I think there is a case here for the jury under the first, third, sixth, and twelfth counts."

In his instructions to the jury upon this same case, the Court said:

"Now, the other three counts 3, 6 and 12 are drawn under the second portion of the statute which I read to you and which says in substance that whoever shall wilfully obstruct the recruiting or enlistment

service of the United States to the injury of the service or of the United States, is guilty of an offense. Now, what is the enlistment or recruiting service of the United States? In addition to those who are taken under the draft law of the ages of 21 to 31, that is over 21 and under 31 years of age, there may enlist in the naval or military forces of the United States any man who is over the age of 17 and under the age of 41, by the portion of this same selective-service act, commonly known as the draft law. So that any man over the age of 17 and under the age of 41, may enlist and he is a possible power in the naval and military forces of the United States. When the statute says that one wilfully obstructs the recruiting or enlistment service of the United States, it says in effect, that they obstruct the service which seeks the enlistment of men between those ages. Now what is it to obstruct this service? It must be, as stated before, done wilfully; that is, knowingly and with an evil purpose, not merely unthinkingly, or by unguarded, accidental, or unintentional remarks without the purpose that they would have any result, but it may be done by advising, of

course, directly, as has been illustrated. In an argument against enlistment in the Army, it could be done by saying to men who could enlist and might enlist, not to do so, that it is against your interest, and it is not your duty; but it also may be done by statements, that may impede or hinder or delay or put obstacles in the way of enlistment to the embarrassment of the enlistment service. It may be found to be an obstruction to the enlistment service of the United States if statements are made to those who may enlist, the natural and reasonable effect of which would be, if believed, to discourage, delay, or hinder even though it did not finally prevent those persons from enlisting in the Army or Navy, and thereby injure the service. Statements, the natural effect of which would be to cause men to pause, to consider, to delay, and parhaps to abandon a purpose that otherwise might exist, grow and ripen into action by enlisting in the military and naval forces of the United States, may be an obstruction and may be found by you to be an obstruction. It is not necessary that the obstacle be a physical one. It may be by mere words, because when it

comes to a question of enlistment, a discouragement by words may be more potent than locks or bolts. Statements either of fact or of falsehood or mere prophesy, or predictions, may amount to an obstruction if the natural effect of them is to retard, hinder, or delay the enlistment by those to whom the words are spoken. The evidence shows here that the statements which the defendant is charged to have made under these counts, if you believe they were made, were made to men within the enlistment age, some of them, Mr. Martin and Mr. Fisher—one of them being 33 and the other 34. If you find that the defendant made the statements charged in the indictment or substantially those in these counts, 3, 6 and 12, or either of them, and that he did so wilfully to obstruct, as I have defined it to you, the enlistment service of the United States by so doing, to the injury of that service, then you would be bound to find him guilty under such counts."

Bulletin No. 86 contains the charge of District Judge Munger (U. S. D. C. Nebraska), in the case of the United States vs. H. M. Hendrickson. The Court said:

"Now the service, the enlistment service, comprehends, as it is understood, not only the recruiting office and the machinery where one may be accepted, but it includes those appeals to the patriotism and loyalty of the citizen that may induce him to offer his services. You have seen the posters calling for recruits for the Army or Navy; you know that addresses are made asking for volunteers to enlist; that newspapers, pamphlets, publications ask for men to give their services as volunteer soldiers in this war on behalf of the country, and all such means are a part of the enlistment service or recruiting service and if one obstructs that service, then he does so wilfully under circumstances such as I have cited in the statute, when the nation is at war, he may be guilty under this statute although what he says may not take root in the mind of any man so that he actually fails to enlist—the service has been impeded although the man may not have been. The evidence shows that this remark that this defendant is charged with having made was addressed to two men both of whom were within the enlistment age as any man who is over 17

and is under 40 may enlist in the Army of the United States.

"Now as to what was said, as I have indicated, there is a dispute. Some of the things that are charged in the indictment to have been said, and what witnesses testified were said, could not be said to obstruct one from enlisting or to obstruct the enlistment service, even if they had been said, by any reasonable application of them. For instance, when the defendant said that the lust of gold did not bring him to this country, that he was sent as a missionary from Germany, I fail to see how that could deter in any way the enlistment service. But other things that he is charged to have said, such as his sympathies were all with Germany and that he could not help it, because this war was nothing but a commercial war, and that the United States went into it for gain, that he would as leave be in Germany as in the United States, might be found by you to be of such a nature that they could reasonably have an effect upon the mind of one who might enlist so as to chill his enthusiasm, to cause him to pause and consider whether a war of that nature and a country

of that kind was worthy of his volunteer service. And if the natural and reasonable effect of any such statements as those made to one within the enlistment age and to whom they were addressed would be to place an obstacle to the enlistment service of the United States, then you could find that an offense had been committed by the use of such language, as well as if a physical obstacle had been placed in the way of a man who was on the road to the recruiting office. The obstacle need not be physical, because words of argument or statement, or even of prophesy may be as deterrent and more so than a mere physical obstacle and may be harder to overcome."

Bulletin No. 89 contains the charge of District Judge Elliott (U. S. D. C. South Dakota) in the case of Conrad Kornmann. The Court said:

"Now, as to the matter of obstruction, there are many ways that could occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the point of actually stopping the whole service. It

might be obstructed by taking the registration list and destroying it; by obliterating some of the names on the list; and by persuading some young men who are on that list and subject to call to flee the country or to resist being put in the service. It might extend only to one man, but that would be obstruction. So that 'obstruction' in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment, it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service or of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement and execution of the law, to the injury of the service of the United States. But even if you find the defendant wrote the letter and mailed it, you must, before you can convict the defendant, determine the question as to whether this was done wilfully, that is, that he did this intentionally, that he

wrote this letter and mailed it with the purpose and with the intent alleged in the indictment. You must further find that the natural and ordinary result of the language used by him in the manner in which you find that he used it, and in that connection, that he used it to interfere with the enlistment and recruiting service of the United States.

"Here, of course, you have to take into consideration what are matters of common knowledge; that men must go from home and fathers and mothers must make the sacrifice; that men who enlist are often influenced more or less by the wishes of their parents; and that they are influenced more or less by their view of conditions that they are entering; take all these things into consideration; then take the language used in Exhibit 1, if you find it was used, as heretofore instructed, and determine whether or not the purpose and intent of the defendant was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them, in other words, from a practical stand-

point, whether or not it would interfere naturally with the number of enlistments or the number recruited by the recruiting officers. It is not necessary, of course, and not practical that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient, in the judgment of the court, if the things said, or written, and mailed or uttered, if you find that they were written, mailed, and uttered, were written, mailed, and uttered with that purpose on the part of the defendant, and that they were in their nature, of such character that under ordinary circumstances would ordinarily bring about that result, then the offense, in the judgment of the court, is complete."

Bulletin No. 90 contains the charge of District Judge Neterer (U. S. D. C. Western District of Washington) in the case of the United States vs. Joseph Zittel. The Court said:

"Count II charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States by making statements calculated to prevent one

A. M. Shultz from enlisting in the naval or military forces of the United States. If you find that such conversation as charged in Count II did take place, and the natural, necessary tendencies of such statements as made by the defendant was to obstruct and interfere with the recruiting and enlistment service of the United States, then the defendant would be guilty. In order to secure a conviction under this count it is not necessary that the Government show that some particular individual was actually restrained from entering the service of the United States. It is sufficient, if it is established to your satisfaction, beyond a reasonable doubt, that the natural and probable consequences of such statement upon the mind of an individual who heard the same was to obstruct the recruiting and enlistment service and that the defendant then and there intended that is should be so.' The act prohibited is the act of the defendant if the condition of his mind at the time of the acts shows wrongful intent, and not the effect or the result or the consummation of the act. You are instructed that at the time charged in this indictment this country was

at war with the Imperial German Government, and the act under which this indictment was returned was a law at the time charged, and it is for you to determine whether the language employed, the circumstances under which it was employed, would, as a natural sequence, obstruct the recruiting of the military and naval forces of the United States."

Bulletin No. 106 contains the charge of District Judge Van Valkenburgh (U. S. D. C. Missouri) in the case of the United States vs. Rose Pastor Stokes. The Court said:

"Coming now to the second count: In the second count of the indictment it is charged that the defendant unlawfully, wilfully, knowingly, and feloniously did obstruct the recruiting and enlistment service of the United States to the injury of the said service, and to the injury of the United States, in thus preparing and publishing the said letter. Much that the court has already said with respect to the first count applies here. In order to constitute the offense the United States must have been at war when the letter in question was prepared and pub-

lished, and this is conceded. The defendant must have acted wilfully and knowingly and must have intended the consequences of her act as charged. It will be unnecessary to repeat the circumstances to which reference has been made as bearing upon the question of a wrongful intent and purpose. You will take into consideration all the evidence in the case introduced on behalf of the Government, as well as on behalf of the defendant, in determining what the object and purpose of the defendant was in causing the publication aforesaid. Your attention has been directed to the provisions of law which make all able-bodied male persons between the ages of 18 and 45 years, inclusive, eligible for enlistment. The Army may be increased by recruiting from such. Recruiting stations are established in this city, as in many parts of the country, and by posters placed in windows and upon bill boards, and by various other means, eligible men are solicited to join the Army and Navy. All such instrumentalities, with the officers in charge thereof, constitute, in part at least, the recruiting and enlistment service of the United States, and anything that tends to ob-

struct and interfere therewith is manifestly an injury to said service, and to the United States itself, which requires soldiers promptly for its defense and for the effective prosecution of the war. It is, of course, apparent that such obstruction or interference need not necessarily be physical. But if the publication made, coming to the attention and notice of those who might otherwise join the service, is of such a nature that is reasonably and naturally calculated to cause such persons to hesitate and refuse to enter the service, then that service has been obstructed and impeded to that extent quite as effectively as though the possible recruit had been retarded or prevented from enlisting by the exercise of physical force. The mind is an important factor in the making of a soldier; nor are we confined to the mental attitude of the eligible recruit himself. It is well known that the feelings and views of parents and those nearest and dearest are powerfully influential upon the man himself, and anything which tends to create distrust, indifference, or even hostility among the masses of the people will be reflected in the temper and the spirit of those expected

to rally to the support of their country.

"Your consideration is invited to the effect which the statements contained in this letter would be likely to have not only upon the community at large but upon those men eligible for recruiting and enlistment. If you believe that language is calculated to obstruct, delay, retard, embarrass, and prevent enlistment in the manner indicated, and that it was intended so to do, that the publication was knowingly and wilfully made for that purpose among others, then it is unnecessary for the Government to show that some special person was, in fact, thus lost to the service. Newspapers of wide circulation may be presumed to have that effect upon the minds of some readers, and injury to the service and consequently to the United States itself would naturally and logically ensue."

Bulletin No. 108 contains the charge of District Judge Aldrich (U. S. D. C. New Hampshire) in the case of the United States vs. Gustav Taubert. The Court said:

"Now, when a nation engages in war it is important that it should not be hindered

—that it should not be impeded or embarrassed or retarded or checked or slackened —by internal obstruction; and that means not only in respect to actual war activities in the field, but it must not be hindered in its activities in the direction of preparedness. There are many things to do; there are many things to be done aside from sending soldiers into the field to meet the enemy. There must be preparations. Means must be devised for constituting a volunteer Army or for creating one through compulsory means. The Army must be clothed; the soldiers must be armed, they must be fed, and they must be furnished with hospitals and many other necessities. The Government must construct military buildings and raise money with which to do it; consequently the Government must not be embarrassed in these respects by unreasonable opposition. This Government might well enough have raised the necessary vast sums of money that have been spoken of through the banks and other institutions, but it saw fit to adopt a different way, and we must accept that way as a reasonable one. For the purpose of furnishing the sinews of war,

so to speak, it has adopted means which give the community at large an opportunity to invest in what we call liberty bonds. While policies in respect to a measure of that kind in their incipient stages are proper subjects of political discussion, when the Government has once adopted a certain course as the proper and wise one it is the part of a loyal citizen to accept it as a Government measure which should be sustained in all reasonable ways. Now, then, in order that the Government should not be obstructed and embarrassed in this great conflict, which is bringing sorrow not only to the Nation and the States but to communities and to almost every home—in order that the Government should not be unreasonably obstructed, Congress speedily passed a law, saying, in substance, that it shall be unlawful and deemed to be a wrong thing to make false statements with intent to interfere with the success of the military or naval forces of the United States or to promote the success of its enemies, or to wilfully cause or attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in respect to the military or naval forces of the

United States, or to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States. The statute is thus very broad and comprehensive."

Bulletin No. 109 contains the charge of District Judge Neterer (U. S. D. C. Western District of Washington) in the case of the United States vs. Emil Herman. The Court said:

"There are many things which would interfere with the operation or success of the military of the United States, or that would promote the success of the enemies of the United States, or that would interfere with the recruiting and enlistment of the military forces of the United States. As I have stated, we are now at war. The President has called to the colors more than 2,000,000 men. Many thousand have been sent to France. These men must be supported. There are many elements that enter into the matter of success. I will not attempt to detail them or to detail the many elements that would enter into such relation; but any element which would make it more difficult for the United States to prosecute this war or would make

it easier for the enemy of the United States in the conduct of this war would be a violation of the espionage act, if done wilfully and intentionally as charged in counts three and four. And any act which would make it more difficult to recruit and enlist men in our military forces, whatever it may be, if the defendant did such act wilfully and feloniously as charged in the sixth count of the indictment, it would be unlawful. These are elements which must be considered by you from the evidence which has been presented in this case, and you must determine with relation to these various elements."

Bulletin No. 112 contains the charge of District Judge Brown (U. S. D. C. Alaska) in the case of the United States vs. Dick Windmueller. The Court said:

"In this case the defendant is charged with violation of Section 3 of said act of June 15, 1917, in that he wilfully and unlawfully did obstruct the enlistment and recruiting service of the United States, to the injury of the United States, and it is a question for you to determine in this case whether the defendant did wilfully and unlawfully obstruct the recruiting and enlistment serv-

ice of the United States, and if he did so, the obstruction of such service would be and is injurious to the service of the United States. The obstruction need not be physical and does not necessarily imply prevention. Any and all acts and words or writings that interfere with the operation or success of the military and naval forces of the United States in time of war work to the injury of the service of the United States.

"If a man go about soliciting and urging men not to enlist, impugning the motives of the President and of Congress in declaring war, and misrepresenting the objects of the United States in the war, and expressing the hope that the United States would be defeated and all its soldiers killed, and a jury believed that such facts were proved to their satisfaction beyond a reasonable doubt, they would be justified in finding such defendant guilty of such wilful obstruction even if it was not proved that a single person was induced by such words or declarations not to enlist when otherwise he would have enlisted.

"Before you can find the defendant guil-

ty it is necessary for you to find that he intended to violate the law. Of the law itself he is presumed to have full notice and knowledge.

"A man's intent is a process of the mind and it can only be determined by what he says and does. But every man is presumed to intend the reasonable and natural consequences of his voluntary acts and statements and can not say a thing or do a thing that will necessarily have certain consequences and then say he did not intend them."

Bulletin No. 120 contains the charge of District Judge Sanford (U. S. D. C. Tennessee) in the case of the United States vs. J. I. Graham. The Court said:

"Now, it is not a question whether or not he succeeded in creating any insubordination or disloyalty or mutiny in the military forces. It is not a question whether his language had any effect or not on persons who heard him. The only question is whether or not he used this language, as he concedes that he did, in the attempt to create such insubordination, disloyalty, or mutiny —whether he attempted to do it; not wheth-

er he succeeded in doing it."

Bulletin No. 122 contains the charge of District Judge Killits (U. S. D. C. Ohio) in the case of the United States vs. Amos Hitchcock. The Court said:

> "Now, this statute is to be so interpreted, and you take the law of this case from this court, that the success of the defendant's efforts, if you find them to have been in violation of the statutes, is of no consequence at all. It does not make a bit of difference whether he affected the loyalty of either one of the Mortons in the slightest degree or not. That is not the question. If he left them even more loyal than they were before he talked with them, yet if you can say beyond a reasonable doubt in this case that his efforts there were to weaken their loyalty, and he consciously put them forth with that intent, he is within the purview of this statute."

In defendant's brief much reliance is placed upon the case of United States vs. Hall (248 Fed. 150), wherein District Judge Bourquin directed a verdict of not guilty because the evidence failed to show an actual obstruction and injury to the recruiting and enlistment service of the United

States. This learned judge is apparently the only one of the District Judges throughout the United States to so interpret the Espionage Act. As can be readily seen from the great number of decisions reported above, the weight of authority is overwhelmingly opposed to the interpretation contended by the defendant.

As evidencing the divergent views entertained by Judge Bourquin, attention is called that he also stands alone in his opinion that the term "Military and Naval forces" within the meaning of the Espionage Act includes only those organized and in service and does not include persons merely registered and subject to future organization and service. This is indeed an extreme departure from the now generally accepted meaning of what is included in the term "Military and Naval Forces" of the United States, and is merely submitted as an indication of the views of that learned jurist so radically at variance with those of every other Federal court in the land.

In support of defendant's theory of the law that an actual obstruction and injury to the recruiting and enlistment service of the United States must be proven, counsel relies upon the fact that under the original Espionage Act, Congress speci-

fically includes the words "to the injury of the service," and that, therefore, such obstruction was contemplated by Congress. Counsel also points out that in enacting the Amendment to the Espionage Act the words, "to the injury of the service" were omitted, thereby indicating that Congress sought to cover cases which could not be prosecuted under the original act because of the inclusion of those words in the statute.

The answer to this argument is that Congress, having the benefit of a judicial interpretation of the original act as gathered from the above bulletins, came to the natural conclusion that the addition of these words in the statute added nothing to its enforcement so far as the purpose of that Act was concerned, and being so much surplusage and unnecessary, omitted same in the amended Act.

For as so often stated by the learned Courts throughout the country in instructing juries in cases coming under the original Act, anything that tends to obstruct the recruiting and enlistment service of the United States necessarily works an **injury to the service.**

(See Bulletin No. 4, U. S. vs. Wallace, Supra.)
(Bulletin No. 15, U. S. vs. Pierce, supra.)
(Bulletin No. 53, U. S. vs. Hitt, supra.)

(Bulletin No. 78, U. S. vs. Foster, supra.)
(Bulletin No. 79, U. S. vs. Waldron, supra.)

ASSIGNMENT OF ERROR NO. 6.

This is predicated upon the Court's refusal to give the following charge:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment, he has violated some law of the United States,

he cannot in this trial be tried or convicted of such other offenses." (Page 28.)

The Court properly refused the charge in the particular form in which it was presented in that it was not necessary to prove that the statements were made in the presence of both Luther Davis and William Mitchell. The Court upon that point charged;

> "In this relation, I direct your further attention to certain language of count four, namely, that Rhuberg, at the times stated, did 'speak, debate and agitate to and in the presence of William Mitchell and Luther Davis, and others to the Grand Jury unknown.' It is not a material variance between the indictment and the proofs if the evidence fails to show that the language alleged to have been uttered by the defendant, if in reality uttered, or some substantial part thereof, was uttered in the presence of both of said parties Mitchell and Davis; but it is sufficient if the language, or some substantial part thereof, was used by the defendant with wilful purpose and intent, in the presence of one only of said persons. The essential inquiry is: Did the defendant wilfully use the language imputed to him, or some

substantial part thereof, whether in the presence of both or either of them, or of other persons to the Grand Jury unknown, if any."

(Trans. P. 155.)

It is elementary that a variance of this kind cannot prejudice defendant if the allegations of the indictment and the proof so correspond that defendant is informed of the charge and can protect himself from a second prosecution for the same offense.

(United States vs. Bennett, 227 U. S. 333.)
(United States vs. Bennett, 194 Fed. 630.)
(United States vs. Jones, 179 Fed. 584.)

Furthermore, the statute would have been violated if the remarks had been made to but a single person.

In the case of the United States vs. Frank Stephens (U. S. D. C. Delaware), reported in Bulletin No. 116, containing the charge of District Judge Woolley, the learned Court said:

"The fact that the alleged false statement was addressed to Mabel P. Van Trump when but one other person was present, is without significance. This part of the statute does

not limit the offense to a false statement publicly made or made to a number of persons collectively or to persons in uniform. In other words, the statute is not directed to public speeches; it is sufficient, the other elements of the offense being present, if the statements be made by one person to another. In this instance the prisoner's statement was made to one, who, because a voluntary, was not the less a recognized instrumentality of the Government, engaged in soliciting money for the Government with which to prosecute the war."

ASSIGNMENT OF ERROR NO. 7

The defendant contends that the Court erred in overruling the objection of defendant to, and receiving in evidence certain testimony of Luther Davis on the subject of the war, prior to our participation therein. This was properly admissible on the theory of proving one of the essential ingredients of the offense, to-wit: The wilful motive and intent of the defendant. As stated by the Court, it tended to show the trend of the defendant's mind and his disposition towards this Government. (Trans. P. 52.) This ruling is supported by the following authorities:

Bulletin No. 37 contains the charge of District Judge Hamilton (U. S. D. C. Porto Rico), in the case of the United States vs. Vincenti Capo.

The Court said:

> "Another defense is this, as I have understood the opening statements — I am not quite sure how it stands at present—that the defendant was carrying out a propaganda for many years to secure the independence of Porto Rico. I admitted that evidence, although it related to a long time ago. If it is proven to your satisfaction, of course, that defendant acted with one intent alone, he can not be found guilty for doing it with some other intent. I charge you that if the evidence proves that this propaganda ceased with the 3d of September, up to that time defendant's acts would have been no offense, so that this defense, to have merit, must show that these articles are the legitimate outcome of the ultimate situation produced by the propaganda ending in September, and gentlemen, that is for you to say. If you believe that the public situation in Porto Rico, as shown to you by the evidence and known as a matter of common knowledge surrounding us, show that when he

published these articles he was doing it for the purpose of carrying out some legitimate results of that propaganda, then he would not have the intent of doing it in order to influence or obstruct the enlistment of the United States forces."

Bulletin No. 69 contains the charge of District Judge Dayton (U. S. D. C. West Virginia) in the case of the United States vs. H. E. Kirchner. The Court said:

"Finally, gentlemen, I say to you, as has been stated to you by counsel for both the plaintiff and the defendant, that the statements and declarations made by the defendant, H. E. Kirchner, outside of the Northern District of West Virginia and prior to the passage of this act—not after its passage, but prior to the passage of this act, were admitted to you simply to show the animus and intent of this defendant. Only declarations made by the defendant after the passage of this act are substantive evidence, so far as you may deem them to be material to the charges made in the indictment, and are evidence of direct guilt."

Bulletin No. 81 contains the charge of District

Judge Elliot (U. S. vs. Wolf, supra). The Court said:

"The court has permitted the introduction of statements alleged to have been made by this defendant at or about the same time as the statements charged in the indictment; that is, statements alleged to have been made by the defendant to other persons in the same little town where the alleged offenses were committed, statements of a similar character. You are instructed that this defendant cannot be convicted for having made such statements to such persons. I do not remember the names of the different witnesses—it would not be necessary for me to do so or to repeat them to you. You will have the indictment with you and you may refer to that to see whether or not the other statements, here referred to, are set out in the indictment. You are instructed that, as bearing upon this subject of intent to which I have referred so fully, I have permitted this evidence as to the other statements of a similar character, made by the defendant at the same time, or about the same time (and the court has attempted to keep it within a reasonable latitude of the

indictment). I advise you that I have permitted this evidence to go to you that you may consider the same as showing the defendant's continued speech at other times and places at or about the time of the occurrence out of which the charges here have arisen, to the end that you may consider that upon question of intent, because if it throws some light upon that question it would be competent. In the court's opinion it would be competent for you to take that testimony into consideration, to the end that it may assist you in arriving at a conclusion as to whether or not the defendant intended to use this language in the way and for the purposes alleged in the indictment. The other conversations at or about the same time may help you to say whether or not, and may throw some light upon the views of this defendant. They may enable you to discover, through the light of those other conversations, the bent of mind of the defendant, the attitude of the defendant toward the maintaining of military forces in the United States."

Bulletin No. 106 contains the charge of District Judge Van Valkenburgh (U. S. vs. Stokes, supra).

The Court said:

> "The fourth or remaining question is what was the intent of the defendant in thus exploiting the views contained therein? You have heard her statements and explanations. You consider them in connection with all the evidence in the case and as part thereof. You are, of course, not concluded thereby but have resort to all the surrounding facts and circumstances in evidence. Other statements by the defendant, both oral and written, within a period proximate to the offense charged, have been placed before you for the purpose, and for the sole purpose, of shedding light, if any they may, upon her intent and purpose, because, as I have said, the wrongful intent must be present. It is a part of the charge that the defendant made an attempt to cause insubordination, disloyalty, mutiny, and refusal of duty. The defendant is not on trial for any words or expressions other than such as are contained in the indictment, but you may have recourse to her other utterances, admitted in evidence, in arriving at your conclusion of her intent and purpose in writing this letter of which complaint is made."

Bulletin No. 109 contains the charge of District Judge Neterer (U. S. vs. Herman, supra). The Court said:

> "Evidence was permitted of the purchase and circulation of other literature by this defendant bearing upon the war and the conduct of the war, and of conversation, statements, and likewise correspondence of defendant which might show his condition of mind. This was permitted only for the purpose of indicating to you the trend of his thought with relation to the particular act charged, so as to enable you to conclude the particular intent that induced his conduct if you find that he did any act which is against the law."

Bulletin No. 122 contains the charge of District Judge Killits (U. S. vs. Hitchcock, supra). The Court said:

> "You have been permitted to hear testimony to the effect that he presided at a certain meeting last year in Cleveland when Ruthenberg and Wagennecht and Baker spoke on the subject of the position of the Socialist Party to the war, and that he introduced the speakers. The Court permitted

you to hear what those speakers said in this man's presence and while he was exercising the function of presiding officer. The only place that line of testimony has in this case is to give you the right to consider whether or not the language that was uttered by these men under the apparent sponsorship of the defendant as the presiding officer of the meeting, having, as the testimony here tends to show, a knowledge of the purpose of that meeting, was of such a character as that a loyal man, observant of his duty toward his country, and hearing it, would have been filled with resentment, and if so, whether or not the conduct of the defendant as presiding officer of that meeting in not reprobating that language is indicative at all of his manner of thinking, or has any tendency to establish, in your judgment, his sympathy with that kind of utterance. And if you do so consider his conduct, then you are justified in referring to that conduct for light upon his manner of thinking and upon the subject of what his intent was when he talked to the Morton boys. And the same line of reasoning and the same range of application applies to the other statements put

in evidence here ascribed to the defendant, at other times, to these reporters, and to Mrs. Hyre, and to his fellow member on the school board, and the records of the school board, the resolutions adopted at the Socialist meeting in Cleveland—all of these are properly in this evidence as legitimate matters of reference on your part, that you may get the proper light, insight, into the condition of this man's mind on the 6th of April last in the Morton house, as reflecting the intent with which he made the utterances which you find against him, if any. And they go no further than that. They do not add anything to his guilt; they are not substantive testimony in this case as to guilt. They are only incidents which may have weight with you in this narrow way. Whether they do help you or not is entirely for this jury to say. The court has no right to suggest anything about it at all."

Furthermore the Court expressly limited and qualified the effect of this testimony as shown by the following instruction:

"Evidence has been admitted tending to show that defendant made certain statements derogatory to a friendly attitude on his part

towards this Government as against Germany, prior to the time when war was declared by this country against Germany, and prior to the time when this country became engaged in assembling military forces under the selective draft act. This evidence was admitted for a special purpose, and your consideration of it will be confined to that purpose only, namely: To show, so far as it has a tendency in that direction, the bent of mind and attitude of this defendant, whether more favorably disposed towards Germany than to this country, and the effect such attitude, whatever it was, may have had upon his subsequent acts and demeanor, as an aid for determining with what intent he used the language imputed to him by the indictment, if it appears that he uttered the same, or some substantial part thereof."

(Trans P. 157).

It might be mentioned, in passing, that the defendant failed to request an instruction limiting the effect of this testimony before the jury, and, therefore, is barred from urging as error the failure of the Court so to do.

U. S. vs. Van Deusen, 151 Fed. 989.

U. S. vs. Itow, 233 Fed. 25.
Tevis vs. Ryan, 233 U. S. 273.

ASSIGNMENT OF ERROR No. 8.

The defendant urges here as error the overruling of the motion for arrest of judgment, the points in which motion are that the indictment failed to allege the military or naval service of Mitchell or Davis, and that the defendant had knowledge of the proposed or intended enlistment of these men.

That this is not required by the terms of the statute has already been covered by what has previously been said. Furthermore, as stated in Bulletin No. 76, containing the charge of District Judge Jack, in the case of U. S. vs. Harper, supra:

> "Neither is it necessary that the Government prove that such statements were made in the presence of persons liable to military service. This latter phrase in the indictment may be regarded as surplusage. It is sufficient if you find that such statements were wilfully made with the knowledge that they might be repeated and reach the ears of persons liable to the draft and that they were made for that purpose and with that intent,

thereby to cause insubordination, disloyalty, mutiny, or refusal of duty. However reprehensible the language may have been, it would not constitute the offense charged unless used with such knowledge and intent."

ASSIGNMENT OF ERROR No. 9.

This is based upon the Court's refusal to grant a new trial. It is elementary that the granting of a new trial is within the sound discretion of the Court and error cannot be predicated upon the refusal thereof.

(U. S. vs. Bernal, 241 Fed. 339.)
(U. S. vs. Clark, 245 Fed. 113.)

As stated by the appellate court in the case of U. S. vs. Krafft, reported in Bulletin 84, supra:

"We have thus quoted from the charge at length to show that the law was properly construed by the court and the questions of fact were clearly and properly defined and their determination left to the jury. The jury having found the words charged were used and that Krafft used them with the wilful intent charged, we are bound to accept their verdict and these findings as con-

clusive, if there was any evidence from which a jury could reasonably draw the findings it has made." Humes v. United States, 170 U. S., 210.

"This court has only appellate jurisdiction, and no matter what our opinion of the facts may be, we cannot, as the court below could have, grant a new trial; but our province is to examine the evidence and ascertain if there was evidence to submit to the jury; or, to put it in another way, whether it was the court's duty to withdraw the case from the jury and direct the defendant's acquittal. With that in view, the judges of this court have severally examined and collectively discussed all the evidence, and we agree that the court below was bound, under the proofs, to submit the case to the jury."

CONCLUSION

Out of abundance of caution, we have endeavored conscientiously to answer each and every objection raised by the defendant to the record, but it must already appear quite manifest that there is but one alleged error seriously urged by counsel, and that is that the Third clause of Section Three of the Espionage Act places the burden

upon the Government to prove that the defendant did in fact obstruct the recruiting or enlistment of either Luther Davis or William Mitchell, whereas, the evidence showed that neither of them were in any manner affected by the statements of Rhuberg.

We have endeavored to show by practically the unanimous opinion of the District Court Judges throughout the country that a fair interpretation of the Espionage Act requires no such onus on the part of the Government as is here contended. Their holding is in accord with every principle of logic and reason. To adopt the construction of the Act urged by the defendant would not only place an additional and unnecessary burden upon the prosecution, but would seriously hamper the prosecution of a most dangerous form of German propaganda. It would greatly weaken the efficacy of the act and help none but the enemy. So long as the intention to obstruct, the purpose to obstruct, the motive to obstruct is present, then surely everything that the law condemns is present, although the desired result may not have been accomplished.

While Congress may have inserted the word "attempt" in the original act and thus completely

answered counsel's objection, yet it would only be so much surplusage unnecessary to its enforcement. For instance, had Congress sought to embrace only such cases as actually resulted in an obstruction to the recruiting and enlistment service, it would have in effect questioned the loyalty of our citizens, the integrity of our institutions, and crowned with success the efforts of our enemies to hamper our participation in the war. Such a possibility must be apparent to all. Congress sought to prevent by this Act just what Rhuberg did. It did not seek to question the loyalty of Davis or Mitchell, but to suppress the pernicious propaganda of men like Rhuberg. To have required that Rhuberg should in fact poison the minds of Davis and Mitchell and weaken their loyalty to the extent that they would absolutely refuse to take up arms in defense of their country, would have opened the way to public expression of a disloyal character to old men, women and children who could not enlist, to alien enemies of undisputed Germanic sympathy, to men of registration age, physically disqualified for military service or exempt therefrom and to those who, for other reasons, would not or could not enlist. Such a situation, of course, could not be tolerated.

Let us assume that Rhuberg said these things

to a large number of people and all subject to military service, but all intensely loyal and patriotic with every intention of enlisting. Could counsel conscientiously say that if Rhuberg had the good fortune to escape a well merited chastisement, that he could go his way unpunished simply because his audience was in no way influenced or affected by his pro-German utterances? The conclusion is irresistible that such was not the narrow scope of the enactment. It is not so impotent as counsel contends: it is imbued with all the vigor of an outraged people against the insiduous manifestations of a class of people enjoying the benefits and privileges of a free country, yet lending themselves as instruments to a propaganda to further the cause of our enemies. It would be foolish to close our ears and shut our eyes to the various forms of propaganda seeking to discredit and handicap the Government in the prosecution of this war, with the clear and unmistakable purpose of defeating the objects for which the Government is spending billions of dollars and sacrificing thousands of lives. The present unhappy state of the Russian people and the bayonet thrust which has been made at the heart of Italy are illustrations of the baneful results which may follow an enemy propaganda when permitted to undermine the defensive

strength of a nation at war.

It is important that nothing should interfere with the military and naval forces of the United States when it is at war and in a death struggle. This statute, a supreme measure of legislation, is one of the greatest importance. The very purpose of the Act was to prevent any use of language intended to hamper or defeat the Government in its effort to prosecute the war to a successful termination. We are at war. We are organizing great military forces. The Government intends that these forces and each member thereof should give obedience, loyalty and strict performance of duty to the Government. The Government cannot tolerate for a moment any attempt by any one at any time and at any place to interfere with our armed forces. At the present time the United States is confronted with what we all concede to be the greatest emergency that we have ever been confronted with at any time in our history. There is now required of us the greatest amount of devotion to a common cause; the greatest amount of co-operation and the greatest amount of disposition to further the ultimate success of arms that can be conceived and as a necessary consequence no man should be permitted by deliberate act or even unintentionally to do that which will in any

way detract from the efforts which the United States is putting forth, or postpone for a single moment the early coming of the day when the success of our arms shall be a fact and the righteousness of our cause shall have been demonstrated.

The time for the discussion of the merits of the war is past. There are only two sides to the war. One side is in favor of the United States and the other side is in favor of the enemy of this country. Congress has declared the policy of this Government and no person may say or do anything which may delay or hamper the Government in the execution of the provisions of the law in carrying out that policy. Whether the law is good or not is not at issue. As long as the law is the law, it is the duty of every man to obey it and he may not, under color or pretense of friendly advice, do anything with intent to procure its violation.

We are all determined that the war must be won. No other result can be tolerated. We have a right to take into consideration the general knowledge which we must have that there is only one way to win the war and that is to have armed forces. Immediately after the declaration of the war the Government so prepared itself. It anti-

cipated and intended a conflict of arms on land and probably naval engagements at sea. Congress, therefore, immediately set about providing means to support the organized army as it then existed and to raise and support other additional land and naval forces. It was not only necessary to support, equip and transport those forces, but it was also necessary to protect the organization of the military and naval forces and also to guard against interference with further enlistments. It passed a number of acts in furtherance of those purposes. It passed the draft act for the purpose of calling men between certain ages to the service; and for the purpose of protecting those organizations as well as for preventing interference with the enlistment of those forces. it passed the Espionage Act.

The defendant is charged with having made certain utterances which could not fail but produce a temper and spirit. if permitted to go unpunished. that would interfere and tend naturally and logically to obstruct and interfere with the enlistment service. It was just such a situation that the Espionage Act sought to avert.

After all the question here is that of intent. Did the defendant by the use of this language intend that it should obstruct the recruiting and en-

listment service? The Jury, by its verdict, found that such was his intent. It was entirely a matter for the Jury and the Jury alone to determine, nor does it seem possible that the Jury could have decided otherwise.

Here is a man born in Germany, who came here a stranger and we made him welcome and protected him; penniless, and we gave him a home and a competence and permitted him to enjoy the blessings of a free government. He desired to be one of us and we, in trust and confidence, conferred upon him the greatest honor that could be bestowed upon one who is foreign born, that of American citizenship. We accepted his oath of allegiance as given in good faith, thereby opening to him in generous trust the portals of American opportunity and freedom and admitted him to membership in the family of Americans, giving to him equal rights in the great inheritance which had been created by the blood and the toil of our ancestors, asking nothing from him in return but decent citizenship and adherence to those ideals and principles, which are symbolized by the glorious flag of America. How has Rhuberg requited our trust and hospitality? The record shows that he considered his citizenship merely as a convenient garment to be worn in fair weather, but to be

exchanged for another one in time of storm and stress; that he betrayed the splendid trust we reposed in him; that he not only was unwilling to manifest any devotion or patriotism for the country of his choice and adoption and sworn allegiance, but by his words and actions supported the cause of a country with which we are engaged in a bitter struggle of life and death, a country seeking to destroy the very freedom and liberty which Rhuberg, by his oath of allegiance, promised faithfully to support. Thus did Rhuberg repay his obligation to his adopted country. The duty of loyal allegiance and faithful service to this country, even unto death, rests, of course, upon every American, but how greater does that duty and service devolve upon Americans of foreign origin, for they are not Americans by the accidental right of birth, but by their own free choice for better or for worse.

The disloyalty of Rhuberg is enhanced by his effort to poison the minds of the young—upon whom we hope to build the future of America—against the land of their birth, against a cause as high and as sacred as any for which ever people took up arms. Although his efforts failed of accomplishment, they were none the less malevolent and inimical to our institutions and to our success

in this war. The Espionage Act provides the means for his just and merited punishment. It was passed for just such an exigency as this, to combat the enemy propaganda at home while millions of our boys are facing death on land and on sea, to assure for us the right to freedom and liberty, which we now enjoy, and to safeguard which there is no limit to the sacrifice that can and must be made. As so well stated by District Judge Brown in the case of the United States vs. Windmueller, reported in Bulletin No. 112:

> "The United States is awakening as a giant from sleep and will never cease its sacrifice of lives and treasure until human liberty is firmly established in the civilized countries of the world, or else that civilization goes down in blackness and ruin * * * While its brave soldiers are offering their lives as sacrifice upon the fields of battle against the relentless enemy, the far greater number of people, who remain at home, must see to it that traitors and treasonable utterances are not permitted to weaken and destroy their service and success, nor our unity of purpose."

A considerable portion of defendant's brief is devoted to a carefully worded description of the

life of the defendant, as gathered from his testimony while on the stand, undoubtedly in pursuance to a well thought out effort to minimize the gravity of his spoken words in defiance of law. While Rhuberg's past history may be of interest to a trial jury in determining its verdict, or to a trial court in fixing the punishment, it surely cannot be considered here. Suffice to say, the jury after listening to all of the evidence, including Rhuberg's self-serving declarations, decided against him. It is well settled that the question whether the verdict was contrary to the evidence is one which cannot be considered in this court, if there was any evidence in the record in support of the verdict. (U. S. vs. Crumpton, 138 U. S. 361.) The only question that the jury was sworn to determine was whether the defendant wilfully made these seditious utterances. A remarkable feature of defendant's brief is the utter absence of any frank confession or vigorous denial as to the making of these utterances. We must, therefore, assume that he made them. At any rate, there is evidence of that fact, and the jury having found that they were made with the wilful intent charged, the jury's findings of fact are therefore binding upon this court. (U. S. vs. Dean, 246 Fed. 568.)

After reading defendant's brief, overburdened

as it is with pleas for mercy, sympathy and indulgence, all of which have heretofore already been directed to the trial jury without avail, we cannot help but note a striking similarity with the methods employed by the German soldier to obtain mercy at the hands of his captor in battle. "Kamerad," the German lips say, while the German hands plunges a knife into the heart of the trusting and unsuspecting foe. The highly developed German "Kultur" of preaching unrest and sedition under the guise of friendship, has already been demonstrated in the past.

History already records the fate of Russia, the terrible disaster to the Italian armies last October, and the seething mass of dissatisfaction which is being carefully and constantly fomented in all Allied countries, as striking examples of the danger caused through the failure of suppressing promptly and effectively hostile propaganda.

As so well stated by District Judge Speer in the Jeffersonian case:

> "If by such propaganda American soldiers may be convinced that they are the victims of lawless and unconstitutional oppression, vain indeed will be the efforts to make their deeds rival the glowing traditions of

> their hero strain. On the contrary, the world will behold America's degradation and shame, the disintegration under fire of our line of battle, the inglorious flight of our defenders, like the recent debacle of the Russian army, brought about by methods much the same, the ultimate conquest of our country, the destruction of its institutions and the perishing of popular government on earth."

In the face of the remarks charged to have been made by Rhuberg, which he does not even have the hardihood to deny in his brief, it must be patent that his protestation of loyalty at this time does not ring true or sincere. It is but a snare and a delusion; it is but a sham and a pretense.

The defendant had a fair trial, at which he was ably represented. The jury found him guilty. There is ample evidence in the record in support of the verdict.

We, therefore, respectfully submit that it should not be disturbed.

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